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No. 94-2

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

MITSUBISHI INTERNATIONAL CORPORATION,
Petitioner,

v.

CARDINAL TEXTILE SALES, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

ARGUMENT

Respondents do not, and cannot, reconcile the decision below with the decisions of this Court and now eight Courts of Appeals holding that district courts have the authority under federal law to freeze defendants' assets to protect a money judgment. Respondents concede, as they must, that the Court of Appeals understood its decision in this case to conflict with the decisions of other Circuits. Opp. 24; *see* Pet. App. 28a. In fact, the Ninth and Eleventh Circuits have since cited this very decision as conflicting with the decisions of "[m]ost of the circuits." *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1478-80 (9th Cir. 1994); *see also Rosen v. Cascade Int'l, Inc.*, 21 F.3d 1520, 1528-29 (11th Cir. 1994). Only the Fifth Circuit has agreed with the Eleventh Circuit on this question. *In re Fredeman Litig.*, 843 F.2d 821, 824 (5th Cir. 1988).

In an attempt to persuade the Court that no conflict exists—notwithstanding the contrary conclusions of the Ninth and Eleventh Circuits—respondents posit various supposed distinctions between this case and the conflicting cases: that those cases arose under particular federal statutes; that those cases involved harm that was more irreparable or a public interest that was more compelling; that the injunctions in those cases were narrower. But none of these supposed distinctions was even mentioned, much less relied upon, by the Court of Appeals.[1] Instead, the Eleventh Circuit held that the district court was without authority to freeze respondents' assets because a "general federal rule of equity" bars such relief in *any* case seeking solely a money judgment. Pet. App. 26a. (quoting *Fredeman*, 843 F.2d at 824, and citing *De Beers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212 (1945)). This is the precise issue that "[m]ost of the circuits" have decided to the contrary. *Hilao*, 25 F.3d at 1478. Both the extent of the conflict on this question, and the need for this Court to resolve it, could not be clearer.

1. Only respondents dispute that the Eleventh Circuit's decision in this case conflicts with the decisions of other Circuits. The Eleventh Circuit acknowledged below that "[s]ome federal courts have held to the contrary" on this issue, citing the Third Circuit's decision in *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186 (3d Cir. 1990). Pet. App. 28a n.24. Again in *Rosen*, the same court, speaking through the same judge, noted the conflict between the decision below and the decisions of the First and Third Circuits. 21 F.3d at 1528-29. The Ninth Circuit, too, has recognized this conflict. That court recently observed that "[m]ost of the circuits have held that a preliminary injunction is available in these circumstances,"

[1] Nor did respondents challenge the freeze of their assets in the Court of Appeals based on any such supposed distinctions. Respondents did, however, unsuccessfully advance many of these same distinctions in opposing Mitsubishi's stay application, which was granted by Justice Kennedy on June 1, 1994. Pet. App. 93a.

but that "[t]he Fifth and Eleventh Circuits have held to the contrary," citing the decision below as representing the Eleventh Circuit's position. *Hilao*, 25 F.3d at 1478-80.

2. Respondents contend (Opp. 17) that "[s]everal" of the conflicting Court of Appeals cases, as well as this Court's decisions in *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940), and *United States v. First National City Bank*, 379 U.S. 378 (1965), are distinguishable because "the interlocutory injunctive relief accorded [in those cases] was deemed available pursuant to federal statute." Respondents are wrong.

A number of these cases did, of course, present federal statutory causes of action. But none of these cases involved a federal statute that expressly authorized preliminary injunctions freezing assets. For example, while respondents contend that *First National* is distinguishable because the district court was acting pursuant to 26 U.S.C. § 7402(a), that provision simply permits district courts to issue injunctions "necessary or appropriate for the enforcement of the internal revenue laws." It nowhere states, in so many words, that courts may issue preliminary injunctions to prevent defendants from dissipating assets. Section 7402(a) thus provides courts with no more explicit authority to freeze defendants' assets than is provided by the All Writs Act, 28 U.S.C. § 1651(a), which authorizes courts in all cases to issue injunctions "necessary or appropriate in aid of their respective jurisdictions."

The Eleventh Circuit did not even intimate that the "general federal rule of equity" underlying its decision in this case contains such statutory exceptions. Nor did the decisions of this Court or the Courts of Appeals affirming preliminary injunctions freezing assets rest on authority conferred by any particular federal statute. For example, the Court in *First National* did not rely on the terms of 26 U.S.C. § 7402(a) in concluding that a preliminary

injunction freezing assets was within "the authority of the District Court." 379 U.S. at 385. Instead, the Court emphasized that, in contrast to *De Beers* (where the only final relief sought was an injunction against violation of the antitrust laws), "there is here property which would be 'the subject of the provisions of any final decree in the cause.'" *Id.* (quoting *De Beers*, 325 U.S. at 220). The Court then cited, as supporting authority, its earlier decision in *Deckert*, a case that did not involve 26 U.S.C. § 7402(a).[2]

Similarly, in the decisions from other Circuits that upheld preliminary injunctions freezing defendants' assets, the courts did not rely on federal statutes. The courts instead based their decisions on general federal equitable principles, on this Court's decisions in *Deckert* and *First National*, and on appellate decisions in cases that upheld similar injunctions entered without express statutory authority.[3] Indeed, three Circuits have recognized the district courts' authority under Rule 65 to freeze defendants' assets even in cases that present solely state law claims.[4]

3. Respondents repeatedly quote out of context the Eleventh Circuit's statement that "[o]rdinarily, '[t]he gen-

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[2] As the Third Circuit has observed, while "[a]rguably, *First National* could be distinguished from *De Beers*" based on 26 U.S.C. § 7402(a), "*First National* chose not to distinguish *De Beers* on this ground." *Hoxworth*, 903 F.2d at 197 n.15.

[3] *See, e.g., Foltz v. U.S. News & World Report*, 760 F.2d 1300, 1309 (D.C. Cir. 1985) (invoking "the principles that undergird equity jurisprudence"); *In re Feit & Drexler*, 760 F.2d 406, 414, 416 (2d Cir. 1985) (citing *First National*); *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43, 53 (1st Cir. 1986) (citing *Deckert, Foltz* and *Roland Mach. Co. v. Dresser Indus., Inc.*, 479 F.2d 380, 386 (7th Cir. 1984)); *United States ex rel. Taxpayers Against Fraud v. Singer Co.*, 889 F.2d 1327, 1330-31 & n.15 (4th Cir. 1989) (citing *Deckert, First National, Teradyne* and *Roland*).

[4] *See Hughes Network Sys., Inc. v. Interdigital Communications Corp.*, 17 F.3d 691 (4th Cir. 1994); *Gerardi v. Pelullo*, 16 F.3d 1363 (3d Cir. 1994); *Unisys Corp. v. Dataware Prods., Inc.*, 848 F.2d 311, 314 (1st Cir. 1988).

eral federal rule of equity is that a court may not reach a defendant's assets unrelated to the underlying litigation and freeze them so that they may be preserved to satisfy a potential money judgment.' " Pet. App. 26a (quoting *Fredeman*, 843 F.2d at 842). They appear to suggest (*e.g.*, Opp. 9, 16, 17) that the Eleventh Circuit used the word "ordinarily" to qualify its holding that district courts are without authority under Rule 65 to freeze defendants' assets and, therefore, did not decide the broader question whether district courts possess such authority. But respondents' argument cannot withstand scrutiny. One need only read beyond the sentence in which "ordinarily" appears, or examine how that very sentence was used in *Rosen*, to conclude that respondents are mistaken.

The Court of Appeals made this statement during a discussion of Rule 64, which allows prejudgment attachments to the extent available under forum state law. The court was simply espousing the view that, except in the narrow circumstances where a state statute may allow it, defendants' assets cannot be frozen to protect a money judgment. If the court had meant anything more by its use of the word "ordinarily," the court would not have proceeded to declare unequivocally: "Where the state attachment statute does not authorize prejudgment attachment in a given case, a district court is not authorized under Rule 65 to attempt to accomplish the same result by issuing a preliminary injunction." Pet. App. 27a-28a n.24.

Rosen also confirms that the Eleventh Circuit did not intend to qualify its holding that Rule 65 does not permit district courts to freeze defendants' assets in money judgment cases. Speaking through the same judge who authored the opinion in this case, the *Rosen* court stated:

> [C]ases in which the remedy sought is the recovery of money damages do not fall within the jurisdiction of equity. Based upon this fundamental principle of equity jurisprudence, we have explained, " 'the gen-

> eral federal rule of equity is that a court may not reach a defendant's assets unrelated to the underlying litigation and freeze them so that they may be preserved to satisfy a potential money judgment.'" *Mitsubishi Int'l Corp. v. Cardinal Textile Sales*, 14 F.3d 1507, 1521 (11th Cir. 1994)) . . . .

21 F.3d at 1527 (footnote omitted). The word "ordinarily" does not even appear in the court's discussion of the holding of this case.

4. Respondents also assert (Opp. 14) that no conflict exists because the injunction in this case, unlike those in other cases, does not satisfy the traditional "requisites for equitable relief." More specifically, they contend that Mitsubishi has not demonstrated "irreparable harm" (Opp. 14) and that the injunction does not serve the "public interest" (Opp. 20). But the Eleventh Circuit did not address, much less base its decision on, whether either requirement was satisfied here. Nor did respondents challenge the freeze of their assets in the Court of Appeals on either "irreparable harm" on "public interest" grounds.

Having resolved in the negative the threshold question whether district courts have the power under Rule 65 to freeze defendants' assets in money judgment cases, *see* Pet. App. 27a-28a & n.24; Pet. App. 29a-30a,[5] the Eleventh Circuit did not consider the subsequent question whether the district court properly exercised that power in this particular case. The Eleventh Circuit thus did not dispute the district court's finding in this case of "a substantial threat that Mitsubishi will suffer irreparable injury if the injunction is not granted." Pet. App. 67a. Nor did the Eleventh Circuit dispute the district court's finding that "granting of a preliminary injunction will serve the public interest." *Id.*[6]

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[5] An examination of the Eleventh Circuit's opinion immediately reveals that respondents err in asserting (Opp. 5) that this federal issue received "only footnote treatment in the court below." *See* Pet. App. 27a-28a & n.24; Pet. App. 29a-30a.

[6] Neither of the cases that respondents seek to distinguish as involving a "significant public interest"—*Taxpayers Against Fraud*,

5. Respondents next attempt (Opp. 21-22) to distinguish several conflicting cases as involving more "narrowly tailored" injunctions. As noted above, however, the question whether a district court has the power to freeze defendants' assets in money judgment cases is distinct from the question whether a district court has exercised that power in an appropriately restrained manner. The Eleventh Circuit did not consider the breadth of the injunction in this case, having concluded that the district court had no authority to enter any injunction freezing respondents' assets, no matter how narrow or how broad it might be. Nor did respondents themselves ask the Court of Appeals to strike down the injunction as unduly broad.

In any event, the preliminary injunction here—which prevented respondents from dissipating assets that they had "received, directly or indirectly, as a result of yarn or fiber transactions involving Mitsubishi or Mitsubishi funds" (Pet. App. 88a)—was less expansive than those in conflicting cases. For example, the Second Circuit in *In re Feit & Drexler, Inc.*, 760 F.2d 406, 408 (2d Cir. 1985), affirmed an order that "preliminarily restrained [the defendant] from transferring or disposing of any of her property." And the Ninth Circuit in *Hilao*, 25 F.3d at 1480, affirmed a preliminary injunction against the

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889 F.2d 1327, and *Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc.*, 805 F.2d 351 (10th Cir. 1986)—holds that district courts' authority under Rule 65 to freeze a defendant's assets is limited to such cases. In any event, the public interest is at least as great in this case as in many of the conflicting cases from other Circuits, which likewise involve disputes among private parties arising out of their commercial dealings. *E.g.*, *Hoxworth*, 903 F.2d 186; *Airlines Reporting Corp. v. Barry*, 825 F.2d 1220 (8th Cir. 1987); *Teradyne*, 797 F.2d 43. Indeed, there is a significant public interest in holding respondents accountable for their roles in what the dissenting judge below termed "an elaborate scheme to defraud Mitsubishi." Pet. App. 33a.

dissipation of any of the $320 million of assets in the estate of former Philippine President Marcos.[7]

6. Respondents finally argue (Opp. 23) that this case "presents no important or recurring questions warranting the Court's further review." They are mistaken on both counts.

One cannot seriously dispute that the question whether district courts have the authority under federal law to freeze defendants' assets is a "recurring" one. It has arisen this year alone in the Third, Fourth, Ninth and Eleventh Circuits.[8] Almost all of the Courts of Appeals have confronted the question over the past decade. *See* Pet. 12-15 (citing cases). The question is now ripe for resolution by this Court.

The question is also one of considerable practical importance—not only to litigants, but also to the federal judiciary. According to the minority rule adopted by the Fifth and Eleventh Circuits, no matter how certain a district court may be that a defendant is dissipating assets that will be needed to satisfy an eventual money judgment, the court is powerless to stop the defendant from doing so. *See Hoxworth*, 903 F.2d at 194.

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[7] Respondents also attempt to conflate the issue of the district court's power to freeze their assets—the sole issue presented here—with the issue of the propriety of the district court's appointment of a receiver. But the two issues are legally, factually and temporally distinct. After the district court had issued its initial order freezing certain of respondents' assets, Mitsubishi undertook discovery to identify those assets. But Mitsubishi's discovery efforts were stymied by respondents' invocation of their Fifth Amendment privilege against self-incrimination. Pet. App. 63a-65a. It was only then that the district court decided that a receiver should be appointed to locate and preserve respondents' assets. Pet. App. 87a. Respondents' arguments relating to the receiver—arguments neither presented to nor addressed by the court below—are thus nothing more than a red herring.

[8] *See Hilao*, 25 F.3d at 1476-80; *Rosen*, 21 F.3d at 1528-29; *Hughes Network Sys.*, 17 F.3d at 694; *Gerardi*, 16 F.3d at 1373-74.

This is a particularly appropriate case in which to consider the district courts' authority under Rule 65 and the All Writs Act to protect potential money judgments. The issue was squarely decided by the Eleventh Circuit, which recognized the conflict among the Circuits. Moreover, given the stay granted in this case by Justice Kennedy (Pet. App. 93a), the issue has not been mooted by subsequent events in the lower courts. The time is ripe, therefore, for the Court to resolve this important and unsettled question of federal law.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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